***United States Court of Appeals***

***for the Second Circuit***


# RESPONDENT'S BRIEF

# No. 74-1653

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFI[illegible]ERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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On Petition for Review and Cross-Application
for Enforcement of an Order of
The National Labor Relations Board

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## AUTHORITIES CITED

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board's remedial order is reasonable and proper.

## COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (hereinafter "Local 638"), pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), to review an order of the Board issued against it on April 8, 1974. In its cross-application for enforcement, the Board requests that its order be enforced in full. The Board's decision and order (per Chairman Miller, and Members Fanning and Jenkins) are reported at 209 NLRB No. 181 (A. 4-5).[1] This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in New York State.

In the underlying unfair labor practice proceeding the Board found that Local 638 engaged in secondary boycott activity in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. Local 638 does not contest the Board's unfair labor practice findings, but rather, in its brief to the Court, challenges only the validity of the Board's remedial order. So that the Court will understand the basis for the Board's order, a summary of the Board's findings and conclusions is here set forth:

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[1] "A." references are to the pages of the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## I. THE BOARD'S FINDINGS OF FACT

### A. Background

Mandell & Corsini, Inc. (herein "the Company"), is a mechanical contracting firm which installs heating, ventilating and air conditioning systems. It is a member of the Mechanical Contractors Association of New York, Inc. (herein "MCA") (A. 8; 49-50). The Company employs steamfitters who are represented by Local 638 pursuant to a collective bargaining agreement between MCA and Local 638, to which the Company is a signatory (A. 8; 49). Rule IX of this agreement provides that certain specified work is required to be performed by steamfitters either at the jobsite "or in the shop of the direct employer," and in the latter case, the pipe or fittings "must be labeled before leaving the shop" with labels "provided by Local Union 638" (A. 34).

In November 1972, the North Shore Towers Associates, owner of property in Glen Oaks, Queens County, New York, on which it was erecting apartment buildings, contracted orally with the Company for the latter to install a total energy plant, including heating, ventilating and air conditioning equipment at the Glen Oaks building project (A. 8; 51).[2] The contract required, *inter alia,* that the Company furnish and install approximately 6,000 vertical fan coil units known as "Verti Con" units made by "Atmospheric Control Industries, Inc., or an approved equal" (A. 8; 59, 53, 45).

In late fall of 1972, the Company invited bids from several vertical fan coil unit manufacturers (A. 8; 58-59). The Trane Company, a unionized company in Wisconsin that did not have a collective bargaining

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[2] A written contract subsequently was entered into by the Company and North Shore Towers Associates on June 12, 1973 (A 8, n. 1; 180).

contract with Local 638, submitted the low bid, and in December 1972 was awarded a contract for 5,894 vertical fan coil units (A. 8; 59, 71, 180, 183). The verbal order was confirmed by a written letter of intent, and in late February or early March 1973, the Trane units were approved by the architect, engineer, and owner of the North Shore Towers project as being the equal of the Verti Con units made by Atmospheric Control Industries, Inc., referred to in the specifications (A. 9; 183-184, 35).[3]

### B. Local 638 threatens the Company not to install the Trane units

Meanwhile, on December 28, 1972, John Donnelly, a Local 638 business agent, telephoned August Corsini, the Company's chief executive (A. 10; 60). Donnelly asked Corsini where he was buying the vertical fan coil units for the North Shore Towers job, to which Corsini replied that they were being purchased from the Trane Company (A. 10; 60). Donnelly objected that the units had not been purchased from Modular Energy Corporation (herein "MEC"), a manufacturer which also made the same type of vertical fan coil units previously made by Atmospheric Control Industries, Inc., but which, unlike the Trane Company, was party to a collective bargaining contract with Local 638. Donnelly further warned that "his men would not install the units. He would not be able to control the men, [and there] would be a severe labor problem and bloodshed" (A. 10; 60-61, 122-125).

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[3] Atmospheric Control Industries, Inc. was no longer in business at the time material herein (A. 9).

### C. Local 638 instructs its steamfitters not to install the Trane units

On January 9, 1973, Local 638 Business Agent Donnelly visited the North Shore Towers jobsite in Glen Oaks and had a conversation with Superintendent Paul Schembeck, Company Foreman Stephen Ray, and employee Donald Hackett, the Local's shop steward on the project (A. 11; 113, 149). Shop Steward Hackett asked Donnelly what he should do when the vertical fan coil units from Trane arrived on the jobsite. Donnelly replied that it would be "a violation of [Rule IX] of our trade agreement" (A. 11; 150). Schembeck said he would like to see the "problem solved before the units arrived at the job" (A. 11; 118). Donnelly then instructed the others that when the units arrived, they should "bring the men on the job and unload them at the particular areas where they were going to be unloaded and Mr. Donnelly would come out on the job and look at the units and see if they were a violation of our trade agreement (A. 11; 114).[4]

On January 30, 1963, the directors of MCA, including Corsini, met with a group of the Union's business agents to discuss "differences and problems . . . then existing in the industry" (A. 12; 64-65). One of the items on the written agenda was the "problem" posed by Local 638's requirements in respect to the installation of vertical fan coil units (A. 12; 109). Before the meeting began, John Tracey, Local 638's business agent at large, and Business Agent Donnelly told Corsini that he "should buy the units from MEC to avoid any labor problems" (A. 12; 65).

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[4] The general practice when heavy or bulky equipment such as the vertical fan coil units arrives at the jobsite is to unload it from the truck and it is then "distributed to the particular floors that [it is] assigned for and the installation will proceed immediately behind this operation" (A. 11; 117, 115, 187-188).

Corsini replied that he had already purchased the units from the Trane Company (A. 12; 65, 94).

The January 30 meeting was attended by the MCA directors and Local 638 business agents, including Donnelly, Tracey and William Daly. The management representatives complained about Local 638's inconsistent practice of requiring duplication of certain work performed at the factory in connection with the installation of vertical fan coil units purchased from companies with which it had no contracts, whereas no work duplication was required when the identical units were purchased from one of two companies acceptable to Local 638.[5] Local 638's agents explained that because the MEC units had a "UA manufacturer's label," they would be accepted and installed. The agents reiterated the Local's position that only the MEC units and those made by another Company in Maryland were acceptable. It was explained that all other "units made out of the jurisdiction of [Local] 638 would not be accepted in New York City" and "would not be installed in New York City" without duplication of factory work (A. 13; 65-66, 101, 103-108).

## II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that Local 638 violated Section 8(b)(4)(i) and (ii)(B) of the Act. Subparagraph (i) of the section was violated, the Board found, on January 9, 1973, when Business Agent Donnelly instructed Shop Steward Hackett, an employee of the Company, only to unload the vertical fan coil units when they arrived at the jobsite and then await Donnelly's inspection, but not to distribute

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[5] Thus, Local 638 made no objection to the installation of MEC units by Ronnell Systems, Incorporated, another mechanical contractor in New York City (A. 9-10; 79).

them to the floors of the structure and install them, as would normally be done (A. 16). The Board found that Local 638 violated subparagraph (ii) by Donnelly's threats to Corsini on December 28, 1972, that "his men would not install the [Trane] units," that he "would not be able to control the men," and that there "would be a severe labor problem and bloodshed" (A. 15). Subparagraph (ii) was also violated, the Board found, on January 30, 1973, when Local 638's agents warned Corsini that he "should buy the units from MEC to avoid any labor problems," and when they warned Corsini and the other MCA directors that unless vertical fan coil units were made under the jurisdiction of Local 638 and had the "UA manufacturer's label" they would not be acceptable for installation in New York City without duplication of factory work (A. 17). In concluding that Local 638's conduct was for an unlawful object, the Board found that the Company was a neutral (secondary) employer and that Local 638 was seeking to satisfy objectives *vis-à-vis* "Trane and other manufacturers of vertical fan coil units who, unlike MEC, were not parties to collective bargaining contracts" with Local 638 (A. 16-17).

The Board's order requires Local 638 to cease and desist from (a) engaging in, inducing or encouraging the Company's employees or those of "any other employer or person engaged in commerce or in an industry affecting commerce," to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or (b) threatening, coercing or restraining the Company "or any other person engaged in commerce or in an industry affecting commerce," where in either case object thereof is to force or require the Company "or any other employer or person" to cease doing business with, or handling the products of, the Trane Company "or any other employer or person." Affirmatively, the Board's order requires Local 638 to post appropriate notices.

## ARGUMENT

### THE BOARD'S REMEDIAL ORDER IS REASONABLE AND PROPER

Local 638 does not challenge the Board's unfair labor practice findings, but only certain provisions of the remedial order entered by the Board. Specifically, Local 638 objects to the fact that the order prohibits it from engaging in secondary boycott activities not only as to Mandell & Corsini and the Trane Company but, in addition, as to other "employers" or "persons engaged in commerce." Local 638 characterizes the order as "broad at both ends" (Br. i), by which it means that the language in paragraph 1(a) of the order that is objected to is contained not only in the opening prohibitory clauses, but also in the closing clause which defines the proscribed object. As we show below, the Board's order is fully warranted both on the basis of the credited evidence in this case and in light of Local 638's record in other Board proceedings in which it has been found to have committed violations of the secondary boycott provisions of the Act.

Section 10(c) of the Act specifically "charges the Board with the task of devising remedies to effectuate the policies of the Act." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941). So long as the Board's remedies cannot be said to achieve policies not countenanced by the Act, "the power . . . is a broad discretionary one . . . for the Board to wield, not for the courts." *N.L.R.B. v. Seven-Up Bottling Co., supra*, 344 U.S. at 346. See also, *Amalgamated Local Union 335 v. N.L.R.B.*, 481 F.2d 996, 1006 (C.A. 2, 1973).

The Board's order here requires Local 638 to cease from encouraging employees of the Company or "any other employer or person engaged in commerce" from engaging in a strike or refusal to handle goods, and

from threatening or coercing the Company "or any other person engaged in commerce," where, in either case an object is to force the Company "or any other employer or person," to cease dealing with the products of the Trane Company "or any other employer or person." Such an order is justified as a means of protecting "other employers . . . exposed to the same type of pressure through other comparable channels." *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B.*, 341 U.S. 694, 705-706 (1951). The broad terms of the Board order here are appropriate "if there is evidence in the record of some general scheme or design or proclivity for such unlawful practices" (*N.L.R.B. v. International Union of Operating Engineers, Local 571*, 317 F.2d 638, 644 (C.A. 8, 1963)), or if there is "reason to fear that future violations would result from a pattern or plan of illegal activity already instituted." *N.L.R.B. v. Local 282, International Brotherhood of Teamsters*, 428 F.2d 994, 999 (C.A. 2, 1970).

Consistent with the foregoing, this Court has repeatedly sustained broad remedial orders issued by the Board where there is "evidence that the specific violations found in the proceedings before the Board 'derive from a generalized campaign and that a prohibition directly solely against [the specific acts of misconduct] . . . in the instant cases would be inadequate to guard against such a campaign.'" *N.L.R.B. v. Associated Musicians of Greater New York, Local 802*, 422 F.2d 850, 851 (C.A. 2, 1970), quoting *N.L.R.B. v. Local 25, I.B.E.W.*, 383 F.2d 449, 454-455 (C.A. 2, 1967); see also, *N.L.R.B. v. Local 138, etc., I.U.O.E.*, 377 F.2d 528, 530 (C.A. 2, 1967); *N.L.R.B. v. Milk Drivers and Dairy Employees Local Union 584*, 341 F.2d 29, 33 (C.A. 2, 1965), cert. denied, 382 U.S. 816; *N.L.R.B. v. Local Union No. 3, I.B.E.W.*, 477 F.2d 260, 268-269 (C.A. 2, 1973), cert. denied, 414 U.S. 1065; *N.L.R.B. v. Local 810, Steel, Metals, Alloys and Hardware Fabricators*, 299 F.2d 636 (C.A. 2, 1962).

Applying these principles, we submit that the Board's imposition of a broad order in this case was reasonable and proper, for there is evidence both of a "generalized campaign" and "a proclivity" by Local 638 to violate the secondary boycott prohibitions of the Act. Conclusive evidence in this regard was provided by Local 638's business agents at their meeting on January 30, 1973, with management officials comprising the directors of MCA. The Union agents were unequivocal in expressing Local 638's intent to prevent the installation of vertical fan coil units made by any manufacturer not under contract with the Local. Local 638's agents informed the employer representatives that only those units made by MEC and by a Maryland company were acceptable for installation. Any others would not be acceptable in Local 638 territory and "would not be installed in New York City" without the duplication of factory work (A. 101, 103-108). This statement of Local 638's "avowed intention" to interfere with the installation by Mandell & Corsini "or any other employer" of units made by Trane Company "or any other employer" unless the manufacturer had a contract with Local 638 fully justified the Board's issuance of a broad order in this case. *N.L.R.B. v. Milk Drivers and Dairy Employees Local Union 584, supra,* 341 F.2d at 33. And see cases cited *supra.* Indeed, a more narrow order such as is sought by Local 638 would be inappropriate, for it would not conform with the evidence adduced before the Board. In light of Local 638's own declaration of intent, a remedy in this case would not be fully effective if its operation was dependent on the fortuity of whether the same contractor – Mandell & Corsini – and the same supplier of manufactured units – Trane – involved in this case happen also to be involved in a future case where Local 638 may choose to exert unlawful pressure in support of its policy of interfering with the installation of units not manufactured within its jurisdiction. In short, this case presents a classic situation for the imposition of a restraint against Local 638's secondary

activity that is not limited to the particular employees involved in this case. As the Supreme Court has held, when a purpose to continue an unlawful course of conduct " 'appears from a clear violation of the law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.' " *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B., supra,* 341 U.S. at 706, quoting *International Salt Co. v. United States,* 332 U.S. 392, 400 (1947).

Finally, it is well settled that the Board, in determining the nature and extent of the remedy to be imposed, need not confine itself solely to the record in the case before it, but may consider prior cases involving the same respondent in which other, similar violations were found. *N.L.R.B. v. Local Union No. 3, I.B.E.W., supra,* 477 F.2d at 268-269; *N.L.R.B. v. Local 282, International Brotherhood of Teamsters,* 344 F.2d 649, 652-653 (C.A. 2, 1965). The past history of Local 638 amply demonstrates its proclivity for engaging in violations of the Act similar to those committed in this case. Thus, besides the violations here, Local 638 has been found to have violated secondary boycott provisions of the Act in five prior cases: *Enterprise Association, etc., Local 638 (The Austin Company),* 204 NLRB No. 118, 83 LRRM 1396 (1973), enforcement pending in the Court of Appeals for the District of Columbia Circuit, *Enterprise Association, etc., Local 638 v. N.L.R.B.,* No. 73-1764; *Enterprise Association, etc., Local 638 (Enterprise Fire Extinguisher Corp.),* Board Case No. 29-33-347 (Board order issued April 18, 1974, summarily affirming Administrative Law Judge's decision); *Enterprise Association, etc., Local 638 (All-Boro Air Conditioning Corp.,* 136 NLRB 1631 (1962); *Enterprise Association, etc., Local 638 (Allen-Stevens Corp.),* 129 NLRB 555 (1960); and *Enterprise Association, etc., Local 638 (Mechanical Contractors Association of New York),* 124 NLRB 521, enforced as modified, 285 F.2d 642 (C.A. 2, 1960).

Local 638 contends that its prior violations of the Act should be disregarded because they are "ancient history" or "*de minimis*" (Br. 13-14). Local 638's argument overlooks the fact, however, that in each of the cited cases the Board found violations of the Act similar in nature to those in the instant case. That Local 638 has been violating the Act over a long period of time does not relieve it of its responsibility and, indeed, strengthens the case for enjoining future violations. *N.L.R.B. v. Local Union No. 3, I.B.E.W., supra,* 477 F.2d at 268-269; *N.L.R.B. v. Local 282, International Brotherhood of Teamsters, supra,* 344 F.2d at 652-653.

Local 638 also places reliance on *N.L.R.B. v. Local Union 25, I.B.E.W.*, 491 F.2d 838 (1974), enforcing as modified, 202 NLRB 912, where this Court recently refused to enforce a broad order in a secondary boycott case, because there was "no evidence . . . that Local 25 had engaged in a violation against employees of any employer other than Comtech." 491 F.2d at 841. However, that case is clearly distinguishable, for here, in contrast to that case, the Board, in fashioning its order, specifically took into account Local 638's past record of violations. Further, here, as we have seen, the record contains the express admission of Local 638 that it intends to continue in the future with its campaign to prevent the installation of any vertical fan coil units made by any manufacturer not under contract with Local 638. This means that both employers that manufacture units not approved by Local 638 as well as those that install them face the possibility of becoming targets of Local 638 secondary activity. We submit that in the face of such clear evidence of "a generalized scheme" involving resort to unlawful secondary activity, a broad order such as that imposed by the Board in this case is clearly

justified. *Communications Workers of America, AFL-CIO v. N.L.R.B.*, 362 U.S. 479, 481 (1960); and see cases cited *supra*, p. 9.[6]

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition of Local 638 to review the broad aspect of the Board's order be denied, and that the Board's order be enforced in full.

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October 1974.

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[6] Local 638 also mistakenly seeks support for its position from an earlier secondary boycott case in which it was a party before this Court. *Enterprise Association, etc., Local 638 (Mechanical Contractors Association of New York)*, 124 NLRB 521, enforced as modified, 285 F.2d 642 (C.A. 2, 1960). The Court's rationale for modifying that broad order is inapplicable here, for that case was only the first of the several proceedings in which, as we have seen, Local 638 has been found to have engaged in unlawful secondary activity. Further, there, unlike this case, there was "no evidence" of any attempt by the Local to bring secondary pressures to bear on any employer other than the ones in that proceeding. 285 F.2d at 646.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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| Respondent. | ) | |

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 25th day of October, 1974